



## **Report of the Justice Initiative:**

Recommendations  
of the Massachusetts Attorney General and District Attorneys  
to Improve the Investigation and Prosecution of Cases  
in the Criminal Justice System

**September 2006**

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The Massachusetts District Attorneys Association (MDAA) is an independent state agency that supports the District Attorneys' education, training, policy and technology operations.

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## I. Introduction

During the year 2004, as the Massachusetts press reported on a series of defendants who had been exonerated after spending years in prison for crimes they did not commit, the Attorney General and District Attorneys united in a collaborative effort, "**The Justice Initiative**." Deriving its name from the public prosecutors' core mission *to seek justice*,<sup>1</sup> the Justice Initiative's mandate was to examine the criminal justice system as a whole to identify any systemic problems and propose improvements in the investigation and prosecution of criminal cases.

Any erroneous conviction is a serious injustice. But it is important at the outset to put this issue in perspective. Most of the profiled cases were rapes and murders that were investigated and tried 10, 15 and 20 years ago, where the defendants were convicted based on eyewitness identification and later exonerated by DNA. This was before DNA came into general usage in the trials of major felonies in the mid to late 1990s.<sup>2</sup> During that time span, the District Attorneys collectively prosecuted millions of cases.<sup>3</sup> Thus, this handful of high-profile cases from the 1980s and early 1990s did not suggest a present systems failure, but rather provided the Commonwealth's chief law enforcement officers the opportunity to undertake a thoughtful, global review of the criminal justice system, identify areas that need improvement, and make recommendations.<sup>4</sup> What was at stake was not only the integrity of

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<sup>1</sup> "A district attorney's professional responsibility is to seek justice -- to protect the innocent as well as to convict the guilty." *Commonwealth v. Tabor*, 376 Mass. 811, 817 n.10 (1978).

<sup>2</sup> Exculpatory DNA tests were ruled admissible in *Commonwealth v. Curnin*, 409 Mass. 218 (1991). DNA was held generally admissible in *Commonwealth v. Lanigan (II)*, 419 Mass. 15 (1994).

<sup>3</sup> In the last ten years alone, approximately three millions cases have passed through the Commonwealth's criminal Courts. Source: Annual Reports on the State of the Massachusetts Court System.

<sup>4</sup> In the cases profiled in the newspapers, it is also important to note the critical difference between cases where DNA exonerated a defendant, and other cases where the defendant was simply granted a new trial. It is common in the criminal justice

individual prosecutions, but also the confidence of the public in the integrity of the system itself. A just and accurate result in a criminal case serves not only to protect the innocent but also to promote public safety, deter crime and hold the guilty accountable.

As they undertook their review, the Attorney General and District Attorneys were keenly aware that the criminal justice system is comprised of multiple entities - - police, prosecutors, judges - - and that it is often not a single error, but a constellation of factors, that leads to an erroneous conviction.<sup>5</sup> With that in mind, the Justice Initiative examined cases from the 1980s and 1990s, looking not only at what went wrong in particular cases but also at the thoroughness of the investigation, the quality of witnesses, the availability of forensic evidence<sup>6</sup>, the performance of the prosecutor and the vigor of the defense.<sup>7</sup>

The Justice Initiative's findings corroborate the Canadian 2004 study: it was often a host of factors that contributed to a flawed procedure and an erroneous conviction. While almost all of the studied cases predated the admissibility of DNA in 1994, only six of those 15 cases ultimately resulted in exoneration based on DNA. In four cases there was no forensic evidence at all; in two

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system for cases to be reversed for procedural errors and for more substantive errors, such as ineffective assistance of defense counsel, errors by the prosecution in closing argument, or by improper jury instructions given by the judge. This means that the defendant is entitled to a new trial, not that he is factually innocent of the crime charged.

<sup>5</sup> See *Report on the Prevention of Miscarriages of Justice*, Federal Prosecution Service Heads of Prosecution Committee, September 2004. This recent two-year study of wrongful convictions in Canada, conducted by Canadian prosecutors and police, confirms that it is often a host of factors that contribute to erroneous convictions.

<sup>6</sup> The recent availability of DNA has served not only to establish the factual innocence of those wrongfully convicted, but also to confirm the guilt of those who have loudly protested, post-conviction, their innocence. See, e.g., *Commonwealth v. Benjamin LeGuer*, Worcester County Indictments WOCR1983-103391; *Commonwealth v. Mark Heslin*, Plymouth County Indictments 93-919, 920, 922.

<sup>7</sup> The 15 cases examined were those of Ulysses Rodriguez Charles, Stephan Cowans, Shawn Drumgold, Christopher Harding, Donnell Johnson, Neil Miller, Marvin Mitchell, Marlon Passley, Anthony Powell, Luis Santos, Harold Sullivan (Suffolk County); Kenneth Waters, Eric Sarsfield and Dennis Maher (Middlesex); Angel Hernandez (Hampden).

cases, the Commonwealth failed to pursue biological evidence gathered at the scene or from the victim.

Many of these cases relied exclusively or principally on erroneous eyewitness identifications. A number of the initial witness identifications in these cases took places under suggestive circumstances. In at least seven Suffolk County cases, mostly from the 1980s, the Commonwealth did not use the Grand Jury to fully investigate the case but simply presented summary witnesses. In two cases, the Commonwealth failed to disclose exculpatory evidence to the defense or investigate the legitimacy of the defendant's claim of alibi. In one case the Commonwealth's fingerprint evidence was flawed. And in at least two cases, the performance by defense counsel was grossly substandard.

As the Justice Initiative studied these cases, the Attorney General and District Attorneys have aggressively moved forward on several fronts. They have trained their prosecutors and police investigators on two significant changes in criminal investigations: (1) the newly amended Rules of Criminal Procedure, which impose additional requirements on prosecutors concerning the timely and comprehensive disclosure of relevant evidence and on police officers to document identification procedures, and (2) the ruling in *Commonwealth v. DiGiambattista*,<sup>8</sup> which strongly supports a requirement<sup>9</sup> that police electronically record suspect interrogations that will be used at trial. In Suffolk County, the District Attorney's Office and Boston Police Department entered into a joint agreement to substantially revise how eyewitness identification procedures will be conducted.<sup>10</sup> The work on these issues directly affects the content of this report. Justice Initiative members have met with the New England Innocence Project twice and reviewed NEIP's extensive recommendations on an earlier draft of this report.<sup>11</sup>

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<sup>8</sup> 442 Mass. 423 (2004).

<sup>9</sup> On pains of an onerous jury instruction questioning the credibility of police testimony at trial.

<sup>10</sup> See Appendix A, *Report of the Task Force on Eyewitness Evidence*, July 2004.

<sup>11</sup> The District Attorneys thank the New England Innocence Project and Jennifer Chunias in particular for their efforts in reviewing and commenting on this project.

There is a direct correlation between excellent forensics services and the quality of justice.<sup>12</sup> The District Attorneys want to underscore the marked improvement in the overall state of forensics in the Commonwealth since the time of many of the convictions at issue, and especially since the beginning of the Justice Initiative. Thanks to the leadership of Governor Romney and the legislature, and especially Senate President Travaglini, in the last two years the budgets of the State Police Crime Lab and the Medical Examiner have more than doubled. The Governor has reconstituted the Medico-Legal Commission, which has hired a highly-qualified new Chief Medical Examiner who has begun a sweeping overhaul of the Medical Examiner's office. The State Police Crime Lab has doubled its useable space in Sudbury; expanded into an auxiliary space in North Sudbury; and is currently evaluating bids for a ten-fold increased space. The Lab is on schedule to increase by a factor of 10 its number of DNA chemists by January 2007. Drug analysis turn-around time has improved. And a new Undersecretary for Forensic Sciences and Forensic Sciences Advisory Board are hard at work to continue the rapid improvements to the Commonwealth's forensics infrastructure. While much remains to be done, there has been a very significant improvement in forensic services in just the past three years.

Similarly, since this Initiative began, the District Attorneys have moved aggressively to improve their technology infrastructure. MDAA is in the midst of a federally-funded project to link police electronic booking systems to the DAs' case management system, so that suspect data and case reports can be electronically transmitted from the police to the DAs. In FY 2006 MDAA began

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While all their suggestions could not be incorporated into this document, we share a common goal: a criminal process that is just and fair, and the prevention of erroneous convictions.

<sup>12</sup> The New England Innocence Project urges the Justice Initiative to scrutinize the reliability of forensics techniques currently in use. The Attorney General and District Attorneys suggest that the most appropriate venue to challenge the reliability of forensic procedures and experts - - both those utilized by the Commonwealth and those proffered by the defense - - is through individual court cases. See, e.g., *Commonwealth v. Patterson*, Supreme Judicial Court, December 27, 2005 (upholding, with some limitations, the underlying theory and process of latent fingerprint identification).

installation of electronic document management capability for all the DAs; this will be completed by early FY 2007. The Governor's 2004 Commission on Criminal Justice Innovation led to his Executive Order 465 (February 15, 2005) creating the Integrated Criminal Justice Information Systems (ICJIS) Planning Council, whose mission is to foster the timely sharing of accurate information within the criminal justice system. These technology initiatives will translate into better investigations and a faster ability by the Commonwealth to provide discovery at arraignment and during pre-trial proceedings.

Thus, while the immediate impetus for the Justice Initiative has been the handful of cases where a demonstrably unjust result has occurred, the overarching goal of this Justice Initiative is to strengthen and support all aspects of the criminal justice system in order to more perfectly do justice. It is in that spirit that the Attorney General and District Attorneys offer the following recommendations.

These recommendations are offered as *a guide* for prosecutors and police. They do not create new rights, substantive or procedural, and are offered with the specific acknowledgment that, in the Commonwealth, the authority to mandate police procedures lies with the head of each department, and that public safety officials must be free to exercise discretion in adapting any guidelines to the unique circumstances of each case.<sup>13</sup> Nor does the Justice Initiative intend that these recommendations be used to undermine non-suggestive reliable identifications and interrogations based on constitutionally-

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<sup>13</sup> E.g., the State of Wisconsin's *Model Policy and Procedure for Eyewitness Identification* was issued by the Wisconsin Attorney General in 2005 and recommends that police officers conduct double-blind, sequential photo arrays and lineups. However, the document provides this caveat:

No one document can address all the circumstances and/or exigencies that are encountered in the field. This model and guidelines are not intended to be a comprehensive treatment of all the factors involved in criminal investigation. Rather, it is a general policy and procedural guide outlining methods for collecting and preserving evidence. Readers should keep in mind that the information and procedures presented here are intended to be used as guidelines when encountering circumstances and factors not specifically covered. These recommendations are not intended to create, do not create, and may not be relied on to create, any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal.



sound procedures already in use. Given the infinite variety of circumstances in criminal investigations, logistical and legal conditions may dictate the use of alternative procedures; such variances will not necessarily invalidate or detract from the evidence in a particular case. The Justice Initiative does intend that these recommendations be used to improve upon current constitutionally-sound practices.

**I. Recommendations Regarding Eyewitness Identification Procedures**

- a.** Adopt the recommendations on eyewitness identification procedures set forth in *Eyewitness Evidence, A Guide for Law Enforcement*. United States Department of Justice, 1999 (the “DOJ Guide”). ([www.ncjrs.org/pdffiles1/nij/178240.pdf](http://www.ncjrs.org/pdffiles1/nij/178240.pdf); see electronic training materials at [www.ncjrs.org/nij/eyewitness/eyewitness\\_id.html](http://www.ncjrs.org/nij/eyewitness/eyewitness_id.html)).
- b.** Working with the Executive Office of Public Safety (EOPS) and the several police associations and training academies, encourage state and local police departments to adopt and distribute the DOJ Guide and provide training to their officers in the Guide’s procedures, with a particular emphasis on proper witness instructions and the careful documentation of all identification procedures.
- c.** Photo Lineups:

  - i. Sequential vs. simultaneous presentation of photographs: The District Attorneys have reviewed the professional literature that addresses how to improve the reliability of eyewitness identifications by reducing the “relative judgment” employed by witnesses who view simultaneous arrays. Many studies recommend that police investigators present photographs and live subjects *sequentially* to witnesses. Several District Attorneys, supportive of the contents of this report, point to the fact that the DOJ Guide does not take a position on the question of sequential vs. simultaneous presentation of photos and suspects. Recent literature suggests that witnesses shown sequential arrays are simply less likely to make any

identification or provide other useful information at all.<sup>14</sup>

Indeed, a March 2006 report to the Illinois legislature questions whether sequential arrays, which were legislatively-mandated in 2003, in fact produce more reliable results.<sup>15</sup> The District Attorneys feel that with police adherence to reasonable and constitutionally permissible investigative procedures, sequential arrays need not be mandated. The District Attorneys contend that forceful instructions to all witnesses - - that the individual may not be included in the array, that the witness should not feel compelled to make an identification, and that the investigation will continue, regardless of whether the witness makes an identification - - provide the greatest protection against a witness making an erroneous identification, regardless of whether the police employ a simultaneous or sequential procedure.<sup>16</sup>

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<sup>14</sup> Several studies have shown that sequential presentations result in not only a reduction in erroneous identifications but a reduction in accurate identifications as well. Meissner et al, *Eyewitness Decisions in Simultaneous and Sequential Lineups: A Dual-Process Signal Detection Theory Analysis*, Memory & Cognition, Vol. 33 (5), 783-792 (2005); Ebbeson & Flowe, *Simultaneous vs. Sequential Lineups: What Do We Really Know?*, <http://www.psy.ucsd.edu/~eebbesen/SimSeq.htm> (2001); Steblay et al, *Eyewitness Accuracy Rules In Police Showup and Lineup Presentations: A Meta-Analytic Comparison*, Law & Human Behavior, Vol. 25, 523-540 (2003). These results have been interpreted as indicating, not that with sequential presentations witnesses rely less on relative judgment, but that with sequential presentation witnesses are less likely to make any choice at all. Meissner et al, at 784, 790, Ebbeson & Flowe.

<sup>15</sup> *Report to the Legislature of the State of Illinois: The Illinois Pilot Program on Sequential Double-Blind Identification Procedures*, <http://www.chicagopolice.org/IL%20Pilot%20on%20Eyewitness%20ID.pdf>

In 2003, the Illinois legislature passed legislation regarding lineup instructions and lineup construction, and further charged the Illinois State Police with conducting a year-long pilot program to test the effectiveness of the sequential, double-blind procedure in the field. The Illinois data showed that the sequential, double-blind lineups, when compared with the simultaneous method, produced a higher rate of known false picks and a lower rate of "suspect picks." The report states that the "experiments also show that the sequential, double-blind method results in a loss of accurate identifications when compared to the simultaneous method." The report concludes by stating that the "data collected shows that the sequential double-blind method led to a lower rate of suspect identifications as well as a higher known rate of false errors."

<sup>16</sup> Even the most ardent advocates for sequential identification procedures acknowledge that the danger of "relative judgments" can be substantially diminished if the witness is informed in advance that the culprit may not actually be in the array.

- ii. Whenever practical, photo lineups should consist of 8 photographs (7 fillers and 1 suspect).
- iii. Whenever practical, utilize blind administration of photo lineups. Blind administration means that the photo lineup is conducted by an investigator who has no knowledge of which photograph depicts the suspect. The District Attorneys add a forceful caveat to this endorsement of blind administration: some departments are simply too small, or the unfolding circumstances of an investigation do not permit, locating an officer who is both experienced in the professional administration of an array and is unfamiliar with the suspect. The Justice Initiative recognizes that “in some situations, it may be difficult to have an independent administrator conduct the array. In those situations, the investigating officer may conduct the array, but only with safeguards to ensure that s/he is not in a position to unintentionally influence the witness’s selection. Departments are encouraged to come up with their own methods for meeting this recommendation”<sup>17</sup>

**d. Live Lineups:**

- i. Sequential vs. simultaneous presentation of persons in live lineups. The comments above, regarding sequential vs. simultaneous photo arrays, also apply to live arrays.
- ii. Whenever practical, live lineups should consist of 6 persons (5 fillers and 1 suspect).
- iii. Whenever practical, utilize blind administration of live lineups. Blind administration means that the live lineup is conducted by an investigator who does not know who in the lineup is the suspect. The District Attorneys’ caveat regarding blind administration of photo arrays also applies to live lineups.

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See Wells et. al, *Eyewitness Identification Procedures: Recommendations for Line Ups and Photospreads*, Law and Human Behavior , Vol. 22, No. 6 603, 613-615 (1998).

<sup>17</sup> State of Wisconsin’s *Model Policy and Procedure for Eyewitness Identification*, p.12.

- iv. Inform the suspect that his attorney may view the lineup.  
However, in situations where time is of the essence, the lack of a defense attorney, for whatever reason, should not delay the lineup procedure.
- e. Witness Instructions: The District Attorneys cannot overstate the importance of providing clear, consistent and forceful instructions to witnesses prior to viewing photo arrays and live lineups. Prior to administering an identification procedure, police officers should provide the witness with a standard form which provides essential instructions for viewing a photo array or a live lineup. These instructions should include reminders that the array may not include the individual; that the police will continue the investigation, regardless of whether an identification is made; and that it is just as important to clear innocent people from suspicion as it is to identify guilty parties. (See Appendix A, p. 27 for a sample witness instruction form.)
- f. Documentation: Officers should document the identification procedure and any results:
  - i. Preserve photographs and the order in which they were presented to the witness.
  - ii. Preserve the names of all persons in a lineup and the order in which they were viewed.
  - iii. Document the procedure, including the administrator's name, the procedure employed, the date/time/location of the procedure, the number of filler photos, the names of all persons (civilians and officers) present, whether the witness requested repeat/additional viewings, and any identification made.
  - iv. (For examples of reports summarizing photo and live lineups, see Appendix B, p. 28)

## **II. Recommendations Regarding Interrogation Practices**

- a.** Law enforcement officers shall, whenever it is practical and with the suspect's knowledge, electronically record all custodial interrogations of suspects and interrogations of suspects conducted in places of detention.
- b.** DA offices shall assist police departments to develop procedures to implement this policy.
- c.** The Attorney General and DAs shall encourage the Executive Office of Public Safety to provide planning and funding for local and state police departments to acquire professional quality recording equipment to implement this policy.

## **III. Recommendations Regarding Forensics<sup>18</sup>**

- a.** DNA: Of the 15 prosecutions reviewed by the Justice Initiative for this report, all but two occurred before DNA became routinely available in court. In a justice system committed to promptly exonerating the innocent and convicting the guilty, the importance of the Commonwealth's ability to collect, process and report on DNA evidence cannot be overstated. In Massachusetts, despite a strong commitment by both the Governor and the Legislature to improving the system and greatly expanded funding over the last several fiscal years, DNA resources are still inadequate. The State Police Crime Lab Crime Lab has more than trebled its staff in the last two years but needs an additional 50 chemists in order to process the material that the DAs would like to utilize in their investigations

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<sup>18</sup> It is important to note that, notwithstanding the impressions created by popular TV shows such as *CSI*, in the vast majority of cases there is no available forensic evidence, and the Commonwealth must rely on eyewitness testimony, the defendant's inculpatory actions and statements, and circumstantial evidence.

and trials.<sup>19</sup> As of late Summer 2006, it takes approximately ten months for the Lab to screen suspect material for biological content and the conduct DNA analysis. This wait for test results often puts prosecutors between a rock and a hard place: they risk losing the case at trial without the DNA evidence, but they cannot wait for the Crime Lab results, as the defendant may be languishing in jail awaiting trial and the rules of court require that criminal cases be tried within certain time frames. Prosecutors must either forego using the evidence, or send the material to a private forensic lab for testing - - which the DA must pay for out of his/her own budget and which costs double and treble the rate if the work is done by the Crime Lab.

- i. The Commonwealth must make a strong commitment to making DNA evidence available, not only in homicides and sexual assaults, but in every case where such evidence may help exonerate the innocent and convict the guilty.
- ii. The Justice Initiative commends the Executive Office of Public Safety (EOPS) for its formal protest of a 2004 F.B.I. mandate requiring the State Police Crime Lab to review all results of private-lab CODIS testing. This FBI directive accounts for a sizeable portion of the present delay in forensic DNA testing, as significant lab resources must be diverted to this review process.<sup>20</sup>

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<sup>19</sup> The Crime Lab has approximately 30 DNA chemists as of the Summer of 2006, and estimates that it will need approximately 80 full-time DNA chemists to keep current with the Commonwealth's forensics needs.

<sup>20</sup> By law, Massachusetts authorities must collect DNA samples from all convicted felons. See G.L. c.22E, §3. The felon's DNA profile is extracted from the sample and uploaded into the state's DNA database and the national CODIS (Combined DNA Index System). Massachusetts, in a practice that is common to many states, routinely sends these convicted offender samples to private, accredited labs for bulk testing. However, the FBI, which controls the quality standards for DNA data input into CODIS, has ordered that all CODIS samples that the states send to private labs must be reviewed by qualified DNA examiners from the state lab before they can be entered into CODIS. This requirement for a 100% sample review is unnecessarily stringent, as any "cold hit" (officially called a "candidate match") between crime scene DNA and a person whose DNA is in CODIS automatically leads to a re-testing by the state lab of the DNA

- iii. The legislature must continue the commitment reflected in the FY 2006 and FY 2007 budgets and make available the resources for the lab to hire additional chemists until it reaches its full complement of DNA chemists.
- b. New Facilities for the State Police Crime Lab:** The main site of the State Police Crime Lab in Sudbury has 10,000 square feet. Experts estimate that a new Commonwealth Forensic Technology Center will require 230,000 square feet to meet the state's foreseeable needs for forensic and scientific evidence. After years of chemists working cheek-by-jowl, jockeying for adequate bench space and with evidence stacked to the ceilings, the Lab has made great progress: in July 2005 the State Police opened a Lab Annex in North Sudbury, which provides an additional 12,000 square feet, and in October 2006 will move some operations into a newly-leased Maynard location with 65,000 square feet. Despite this progress, these three locations will collectively provide only about one-third of the space that the Lab actually needs.
  - i. The Justice Initiative urges the legislature in its anticipated special formal session in September 2006 to act on the pending capitol bond bill and approve the proposed \$125M for the new Forensic Technology Center and \$15M to improve facilities of the Office of the Chief Medical Examiner.
- c. Office of the Chief Medical Examiner:** The Attorney General and District Attorneys recognize the significant advances made by EOPS in addressing the management and resources issues at the OCME. These advances result principally from significant new funding from the legislature in FY 2005, and the management and oversight of the Commonwealth's new Undersecretary for Forensic Services. The Attorney General and District Attorneys applaud Governor Romney's selection of Dr. Mark Flomenbaum as the new Chief Medical Examiner. Dr.

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for the suspect in question, before reporting of this "candidate match" to investigators or the District Attorneys.



Flomenbaum faces the monumental challenge of reversing the effects of eighteen years of level funding of the OCME. He has already started on that process, by hiring new assistant medical examiners and initiating a fellowship program. These reforms must continue as the office seeks accreditation, and full reform can be accomplished only if the Governor and legislature continue to significantly expand the OCME's resources.

- d. The SANE Program: When the Justice Initiative began in 2004, the Massachusetts Sexual Assault Nurse Examiner (SANE) program, which operates as a program of the Department of Public Health and provides coordinated medical and forensic services to victims of sexual assault over the age of 12, was on the verge of closing its doors for lack of funding. Over the past two years, due to the concerted efforts of Lt. Governor Healey, the Governor's Commission on Sexual and Domestic Violence and the legislature, this program has experienced a dramatic turnaround, both in funding and structure.
  - i. Utilizing a cadre of nurses who are specially trained and certified by the Department of Public Health to perform forensic medical-legal exams, the SANE program dispatches on-call nurses to 23 designated hospital emergency departments and urgent care centers across the Commonwealth. The SANE nurses provide skilled post-incident care through medical exams, testing and treatment, and collect crucial, time-sensitive forensic evidence using the Massachusetts Sexual Assault Evidence Collection kit, which is provided by EOPS. Where criminal charges are brought, the rape kit is examined by chemists at the Boston Police Lab or the State Police Crime Lab, and the SANE and the police chemists are available to testify if necessary. The SANE program began in 1998; there is a 95% conviction rate where a SANE has collected evidence and testified in court.
  - ii. While DPH is the appropriate agency to set SANE standards for certification, DPH is not set up to provide direct medical and forensic services to sexual assault victims. The SANE nurses --

whose compensation has been wholly inadequate for the professional services they provide, and who often actually lost money because of the way their compensation is structured -- waited many months before being paid. The structure and management problems are reflected in the numbers: as of 2005 SANE had trained over 600 nurses but only 100 remained active.

- iii. The Justice Initiative applauds the FY 2006 budget which doubled the budget for the SANE program<sup>21</sup> and provided funding to establish PEDI-SANE, a similar service for child victims of sexual assault. Furthermore, SANE has now moved its operations to the Massachusetts Office for Victim Assistance, a structural change which will enable the SANE coordinators to be full-time benefitted Commonwealth employees and the SANE nurses to be adequately compensated and paid much more promptly. The SANE goal should be to extend the program so that SANE nurses provide medical and forensic services to *all* sexual assault patients in emergency rooms across the Commonwealth.
- iv. Proposed legislation to codify the SANE program and DPH's certification of SANEs was enacted into law on August 1, 2006.<sup>22</sup>
- v. EOPS should track the dissemination, utilization and crime lab testing of all rape kits, including whether those kits result in criminal prosecution and the resulting rate of conviction.

#### **IV. Recommendations Regarding Training of Police and Prosecutors**

- a. The Justice Initiative recognizes that well-trained, experienced police and prosecutors are critical to skilled investigations and

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<sup>21</sup> From \$860,000 to \$1.7M.

<sup>22</sup> Ch. 194, An Act relative to sexual assault nurse examiners and forensic evidence in cases of sexual assault and rape (see [House, No. 878](#)). Approved by the Governor, August 1, 2006.

prosecutions. In Massachusetts, the commitment to on-going professional training has taken a back seat to the need for funding daily operations. The Criminal Justice Training Council has been significantly underfunded for many years, and there is no requirement that police officers routinely receive a standard, high-quality curriculum. We cannot make meaningful changes in police conduct on the streets until we create a robust system for training and retraining police officers, and develop better partnerships between prosecutors and those who train the police. As with the District Attorneys' offices, the police have "pockets" of excellent training opportunities, but no consistent delivery of training services.

- b.** The Justice Initiative endorses the recommendations of the Law Enforcement and Training Subcommittee of the 2004 Governor's Commission on Criminal Justice Innovation.
  - i. Specifically, the Justice Initiative recommends a comprehensive and coordinated approach to training and professional development in every area of the criminal justice system.
  - ii. Police training must be better funded and coordinated, and the requirement for 40 hours of in-service training for veteran officers strictly enforced.
  - iii. The use of the State Police On-Line Academy, and similar electronic training initiatives, should be maximized.
  - iv. EOPS should assume a leadership role in the training of police, especially regarding the documenting of all investigative procedures and the government's discovery obligations.
  - v. Prosecutors, in particular, need routine training in the areas of ethics, professional responsibility, discovery and handling eyewitness identification issues. To that end, MDAA has recently initiated "Professional Responsibility Notes", delivered electronically to the Commonwealth's 650 prosecutors, along with

summaries of new cases from the state's appellate courts. The Massachusetts District Attorneys Association (MDAA) receives minimal state funding for training but has increasingly drawn on federal grants<sup>23</sup> to provide institutionalized trainings for prosecutors on a wide range of issues.

- vi. The Attorney General's Training Institute, the MDAA and the Committee for Public Counsel Services should consider approaching the Trial Court to propose setting aside a specific time each year for the professional training of persons involved in the court system.<sup>24</sup> One of the greatest impediments to training is staffing shortages; police must often pay overtime to fill in positions where officers are away at training; for the District Attorneys, often courtrooms will go uncovered if an assistant is permitted to leave for training. Setting aside one or two weeks during a traditionally slow summer period will free these professionals for in-depth training, as well as permit joint trainings in related areas.
- vii. The Attorney General and District Attorneys should consider establishing formal training relationships with the several local law schools.<sup>25</sup>

## **VI. Recommendations: Resources for Prosecutors and Public Defenders**

- a. Prosecutors: The public must recognize that there is a direct correlation between the quality of a criminal prosecution and the quality, education, training and experience of the prosecutor. The salaries of Massachusetts prosecutors are scandalously low, especially when viewed in light of the cost of living. Overall, Massachusetts prosecutors are young, ill-paid, with unconscionably high caseloads

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<sup>23</sup> MDAA receives training funds from the Violence Against Women S.T.O.P. program, the Governor's Highway Safety Bureau and the Children's Justice Act.

<sup>24</sup> It is common practice some states to set aside several weeks in the summer for professional training of judges, prosecutors and defenders.

<sup>25</sup> In June 2005 and again in June 2006, Suffolk University Law School, MDAA and CPCS jointly hosted a two-day training on Advanced Evidence Skills for 48 prosecutors and public defenders. The Attorney General's office hosts an annual NITA/NAAG-style week long trial advocacy program at New England School of Law.

and heavy education debts. They are trained attorneys yet earn less than any other person working in the court system - - less than the police, less than probation officers, less than security guards. Consequently, the DAs' average prosecutor turnover rate is more than double that of other state employees<sup>26</sup>.

- b. As long as salaries are low, turnover will remain high, and resources will have to be spent to continually train cadres of new attorneys, instead of focusing on the more senior attorneys who prosecute the most serious cases. There will also be fewer seasoned attorneys to provide vital mentoring - - in the law, procedure and ethics - - to new prosecutors. In short, if we are to retain experienced, well-trained prosecutors, we need to significantly increase prosecutor salaries. The District Attorneys express their thanks to the legislature for new funding for FY 2007 which raised base prosecutor pay to \$37,500 and enabled the DAs to provide long-overdue raises to more senior staff.
- c. Public Defense Services. The same principles hold true for the Committee for Public Counsel Services, which, like the District Attorneys, endures an extremely high staff turnover rate. Just as experienced prosecutors can move cases swiftly through the system, an experienced public defender can move a case to plea or trial in a fraction of the time it takes with junior, inexperienced attorneys. The Attorney General and District Attorneys support systemic improvements in the delivery of defense services to indigents, including significant expansion of the numbers and salaries of CPCS staff attorneys.

## **VII. Implementation and Continuing Review**

- a. Since the Attorney General and District Attorneys began this Justice Initiative, they have made the following progress towards the goals set forth in this report:

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<sup>26</sup> In the sixteen month period from January 1, 2004 to April 30, 2005, the turnover rate for ADAs statewide was 19.5%; the turnover rate for Commonwealth employees overall in FY 2004 was 7.6%. Source: [www.mass.gov/HRD](http://www.mass.gov/HRD); MDAA survey of the Districts May 2005.

i. The District Attorneys from Suffolk, Middlesex and Hampden<sup>27</sup> have reviewed published erroneous conviction cases for indicators for systemic improvements, especially in identification procedures and forensic evidence. In addition, members of the Justice Initiative have met with the New England Innocence Project to review key factors leading to erroneous convictions.

ii. The District Attorneys for Hampden, Norfolk and Northwestern have reviewed convictions dated before DNA was routinely admissible, where defendants were still incarcerated and physical evidence was still available for DNA screening.

**b. Identification Procedures**

i. With the recently-amended rules of criminal procedure mandating that police document identification procedures, the District Attorneys have aggressively trained their staff attorneys and local and state police on these new documentation requirements and on improved identification procedures. The Attorney General, who employs numerous civilian investigators and utilizes the services of dozens of state police detectives, has trained his legal and investigative staff on the New Rules of Criminal Procedure, the implications of *DiGiambattista*, and improved eyewitness identification procedures.

ii. Through a task force, the Suffolk County District Attorney has issued an extensive report recommending significant new procedures, especially regarding eyewitness identifications, for the investigation of criminal cases.

**c. Police Interrogations**

i. In *Commonwealth v. DiGiambattista*, the Supreme Judicial Court effectively mandated the electronic recording of statements that suspects make to the police while in custody or in a place of detention. The District Attorneys have aggressively trained their police departments in implementing *DiGiambattista* (e.g., the Northwestern and Worcester District Attorneys have developed extensive training materials and trained hundreds of police officers; the Berkshire and

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<sup>27</sup> The erroneous conviction cases that have dominated the news for the past several years came out of these three counties.

Cape and Islands District Attorneys Office have trained police officers as well as purchased recording equipment for them.)

- ii. The Boston Police promptly adopted policies and procedures implementing *DiGiambattista*.
- iii. MDAA, the Attorney General's office and the State Police have crafted guidelines for recording policies and procedures to offer to police departments that have not yet developed their own.
- iv. The State Police have designated a senior and highly experienced lieutenant to lead the statewide training effort in implementing these new interrogation policies.
- v. MDAA has met with EOPS to urge EOPS's planning and fiscal assistance to the state and local police in purchasing recording equipment.
- vi. At the District Attorneys' annual statewide conference for prosecutors in April 2005, Saul Kassin addressed approximately 100 prosecutors on the psychology of false confessions.
- vii. MDAA is working with Tom Sullivan, the former United States Attorney for Chicago, who wrote the key study, *Police Experiences with Recording Custodial Interrogations* (available online at [www.jenner.com/policestudy](http://www.jenner.com/policestudy)). This study surveys scores of police departments that routinely record suspect statements, and concludes that recording statements significantly improves investigations and prosecutions.

**d. Improving Forensic Services**

The Attorney General and District Attorneys are deeply committed to the expanded use of forensic evidence to support criminal investigations. Since 2001, the District Attorneys have led the advocacy -- with the Executive and Legislative branches -- for improved forensics at the OCME and the State Police Crime Lab. The FY 2005, FY 2006 and FY 2007 budgets show a dramatic increase in the support for the OCME, the State Police Crime Lab and the SANE program. The FY 2005 budget also gave the District Attorneys the forensic "engine" they have long sought: a new Undersecretary for Forensic Services, who finally provides the single-minded commitment and oversight to forensics that Massachusetts has lacked.

**e. Legislation**

- i. The Attorney General and District Attorneys support amending Massachusetts law to eliminate the statute of limitations in cases involving the sexual assault of children. Specifically, the District Attorney support removing the statute of limitations for the crimes of rape of a child by force, G.L. c. 265, s.22A; assault with intent to rape a child, G.L. c. 265, sec. 24B; and indecent assault and battery on a child under 14, G.L. c. 265, sec. 13B.
- ii. The Attorney General and District Attorneys strongly supported the legislative efforts to establish a simple and effective process to compensate innocent persons who have been erroneously convicted and imprisoned. In late 2004, that bill was signed into law as Chapter 258D, a new chapter in our General Laws. Of the fifteen defendants who cases were examined by the Justice Initiative, twelve filed suit under this new law. Of those twelve, nine<sup>28</sup> have been promptly settled and three are pending.
- iii. The District Attorneys recognize that an expansive CODIS database is a very effective tool for identifying and successfully prosecuting the guilty while exonerating the innocent. To that end, the District Attorneys led the legislative effort in 2003 that resulted in expanding the DNA database to include all convicted felons.<sup>29</sup> This database, which will eventually include more than 40,000 DNA “fingerprints” of convicted Massachusetts felons, has already resulted in “cold hits” that have solved more than 400 cases of murder, rape, and other crimes.

**f. Technology**

- i. The Justice Initiative supports the continued implementation of a police-DA electronic link across the Commonwealth. In 2001, the Hampden County District Attorney’s office pioneered an initiative to establish an electronic link between its automated

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<sup>28</sup> In two of these cases the litigation has not yet been formally concluded but the Commonwealth does not contest the issue of liability.

<sup>29</sup> Forty-four states now require that convicted felons contribute their DNA to their state DNA database.



case tracking system and the local police departments' automated booking systems. Because all the District Attorneys now utilize the same case management system, MDAA, enabled by a federal Byrne grant, has initiated the process of replicating the Hampden-police link with all the DAs' offices. Starting in 2005 with IMC, the largest vendor of police booking software, MDAA began installing police-DA electronic links across the state. MDAA received renewed Byrne funding for FY 2006 to expand this program, which permits the electronic flow of case data and the police report itself from the police department to the DA's case management system. This technology will assist prosecutors in making expedited disclosure of case materials to the defense, which will help move the case to resolution faster.

Finally, the Attorney General and District Attorneys will keep this Justice Initiative active for the purposes of monitoring the adoption of these recommendations and suggesting any revisions or additional recommendations that would improve the investigation and prosecution of identification cases.

## **Appendices**

- A. Witness Instruction Form: Photo and Live Lineups**
- B. Middlesex Police Training material: sample police forms for lineups, photo arrays and show-ups.**
- C. Report of the Suffolk County Task Force on Eyewitness Evidence, July 2004.**

## Appendix A:

### Witness Instruction Form Photo and Live Lineups

- In a moment, I am going to show you a group of photographs/individuals.
- This group of photographs may or may not contain a picture of the person who committed the crime now being investigated. (Or, this group of individuals may or may not include the person who committed the crime now being investigated.)
- (In cases of blind administration): As required by departmental procedure and in order to ensure the fairness of identification procedures, I do not know the suspect(s) in this case.
- Regardless of whether you make an identification, the police will continue to investigate this case.
- It is just as important to clear innocent people from suspicion as it is to identify the guilty parties.
- Keep in mind that individuals may easily change hairstyles, beards and moustaches.
- Also, photographs may not always depict a person's true complexion, which might be lighter or darker than shown in the photograph.
- Photographs are in random order. I will show you each photograph sequentially, one at a time. As you view each photo, take as much time as you need.
- If you recognize anyone as you look at the photographs/individuals, please tell me which photograph/individual you recognize and how you recognize the individual.
- Do not inform other witnesses that you have or have not identified anyone.

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(witness signature)

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(witness name)

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(date/time)

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(officer showing photos/lineup)

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(department incident #)

## **Appendix B**

### **Middlesex County Sample Identification Police Reports**

**Report of Lineup Composition**

**Report of Lineup Identification Procedure**

**Report of Photo Array Composition**

**Report of Photo Array Identification Procedure**

**Report of Show-Up Identification Procedure**

## REPORT OF LINEUP COMPOSITION

Case # \_\_\_\_\_  
Police Dept. \_\_\_\_\_

Date \_\_\_\_\_  
Time Array Composed \_\_\_\_\_

Identifying Witness (*name & DOB*) \_\_\_\_\_

Officer Composing Lineup \_\_\_\_\_

<u>Letter</u> * *	<u>Identification Name/Number of Person</u> (available ID information)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

\*\* Designate each person in the lineup by letter. Circle the letter of the person who is first in the lineup presentation, *selecting someone who is not the suspect*.

### Comments:

I selected these individuals for the lineup presentation for the witness listed above.

\_\_\_\_\_  
Signature of Officer Composing Lineup/date

# REPORT OF LINEUP IDENTIFICATION PROCEDURE

(Side 1 of 2)

Case # \_\_\_\_\_  
Police Dept. \_\_\_\_\_

Date \_\_\_\_\_  
Time \_\_\_\_\_

Officer Composing Lineup \_\_\_\_\_

Officer Presenting Lineup \_\_\_\_\_

All Others Present \_\_\_\_\_

Location/Setup of Lineup \_\_\_\_\_

**Lineup Presentation** (check method used: Sequential or Simultaneous, Blind or Traditional)

- Sequential (*one-by-one*) Subjects were presented in the following order:  
Letter (on back) \_\_\_\_\_  
Order Presented    1<sup>st</sup>    2<sup>nd</sup>    3<sup>rd</sup>    4<sup>th</sup>    5<sup>th</sup>    6<sup>th</sup>    7<sup>th</sup>    8<sup>th</sup>    9<sup>th</sup>
- Simultaneous (*all at once*)
- Blind Presenter (*officer with no information as to suspect*)
- Traditional Presenter

Statements by any other people, made during ID procedure and in presence of witness:

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This is a two-page form. Please complete the second side and have the witness sign.

\_\_\_\_\_  
Signature of Officer Conducting Lineup  
Date:

## REPORT OF LINEUP IDENTIFICATION PROCEDURE

(Side 2 of 2)

Case # \_\_\_\_\_  
Police Dept. \_\_\_\_\_

Date \_\_\_\_\_  
Time \_\_\_\_\_

Identifying Witness (*name & DOB*) \_\_\_\_\_

### Advisements to Witness Before Presentation:

- \_\_\_ 1. I am going to show you a group of individuals who are in random order.
- \_\_\_ 2. The person who committed the crime may or may not be included, so you should not feel compelled to make an identification.
- \_\_\_ 3. It is just as important to clear innocent people as it is to identify possible perpetrators.
- \_\_\_ 4. Whether or not you identify someone, the police will continue to investigate.
- \_\_\_ 5. After you are done, I will not be able to provide you with any feedback or comment on the results of the process.
- \_\_\_ 6. Please do not discuss this identification procedure or the results with other witnesses in this case or with the media.
- \_\_\_ 7. Think back to the time of the event, the place, view, lighting, your frame of mind, etc. Take as much time as you need.
- \_\_\_ 8. People may not appear exactly as they did at the time of the event, because features such as clothing and head/facial hair are subject to change.
- \_\_\_ 9. [Sequential Only] I will show you one person at a time, and cannot tell you how many people there are in total. I will show you all of the people, even if you identify someone earlier. As you finish looking at each person, let me know.
- \_\_\_ 10. As you look at each person, if you see someone that you recognize, please tell me how you know the person, and in your own words, how sure you are of the identification.

Identification made: Yes\_\_\_ No\_\_\_ If Yes, letter/order # selected:

### Witness Identification Statements

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Officer: This is a two-page form. Please complete and sign the first side also.

\_\_\_\_\_  
Conducting Officer Signature      Date

\_\_\_\_\_  
Witness Signature      Date

## REPORT OF PHOTO ARRAY COMPOSITION

Case # \_\_\_\_\_  
Police Dept. \_\_\_\_\_

Date: \_\_\_\_\_  
Time Array Composed: \_\_\_\_\_

Officer Composing Array: \_\_\_\_\_

<u>Letter**</u>	<u>Identification Number of Person/Photo</u> (available ID information)
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

**\*\* Assign a letter to each photo and record it on the back of the photo. For sequential presentations, circle the letter of the photo that is presented first in the array, *one that is not the suspect*.**

**NOTE: Single Page, "Simultaneous" Presentations ONLY:** A computer generated "Investigator Copy" of the array that contains identifying information for each photo should be attached to this form, and can substitute for the information above. Letter identifiers must still be designated for each picture, and should be recorded on the Investigator Copy and the back of each photo.

I selected these photos for the array presentation for the witness listed above. The back of the photos were marked with an identifying letter, as indicated above.

\_\_\_\_\_  
Signature of officer composing array/Date



# REPORT OF PHOTO ARRAY IDENTIFICATION PROCEDURE

(Side 1 of 2)

Case # \_\_\_\_\_  
Police Dept. \_\_\_\_\_

Date \_\_\_\_\_  
Time \_\_\_\_\_

Identifying Witness (*name & DOB*)

\_\_\_\_\_

Officer Composing Array \_\_\_\_\_

Officer Presenting Array \_\_\_\_\_

All Others Present \_\_\_\_\_

Location of Presentation \_\_\_\_\_

**Method of Photo Presentation** (*check Sequential or Simultaneous, Blind or Traditional*)

- Sequential (*one-by-one*) Photos were presented in the following order:

Letter (on back) \_\_\_\_\_  
Order Presented      1<sup>st</sup>    2<sup>nd</sup>    3<sup>rd</sup>    4<sup>th</sup>    5<sup>th</sup>    6<sup>th</sup>    7<sup>th</sup>    8<sup>th</sup>    9<sup>th</sup>

- Simultaneous (*all at once*): \_\_\_\_ One-Page Array   OR   \_\_\_\_ Other Composition  
*(describe/diagram on back)*
- Blind Presenter (*no information regarding suspect*)
- Traditional Presenter

Statements by any other people, made during ID procedure and in presence of witness:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

This is a two-page form. Please complete the second side and have the witness sign.

\_\_\_\_\_  
Signature of officer conducting array/date

# REPORT OF PHOTO ARRAY IDENTIFICATION PROCEDURE

(Side 2 of 2)

Case # \_\_\_\_\_  
Police Dept. \_\_\_\_\_

Date \_\_\_\_\_  
Time \_\_\_\_\_

Identifying Witness (name & DOB) \_\_\_\_\_

## Advisements to Witness Before Presentation

- \_\_\_ 1. I am going to show you a group of photos which are in random order.
- \_\_\_ 2. The person who committed the crime may or may not be included, so you should not feel compelled to make an identification.
- \_\_\_ 3. It is just as important to clear innocent people as it is to identify possible perpetrators.
- \_\_\_ 4. Whether or not you identify someone, the police will continue to investigate.
- \_\_\_ 5. After you are done, I will not be able to provide you with any feedback or comment on the results of the process.
- \_\_\_ 6. Please do not discuss this identification procedure or the results with other witnesses in this case or with the media.
- \_\_\_ 7. Think back to the time of the event, the place, view, lighting, your frame of mind, etc. Take as much time as you need.
- \_\_\_ 8. People may not appear exactly as they did at the time of the event, because features such as clothing and head/facial hair are subject to change.
- \_\_\_ 9. [Sequential Only] I will hand you photos one at a time, and cannot tell you how many photos there are in total. I will show you all of the photos, even if you identify someone in an earlier one. As you finish with a photo, hand it back to me and I will give you another.
- \_\_\_ 10. As you look at each photo, if you see someone that you recognize, please tell me how you know the person, and in your own words, how sure you are of the identification.
- \_\_\_ 11. If you identify someone, place your initials and the date below the photo, clearly marking your selection.

Identification made: Yes\_\_\_ No\_\_\_ If Yes, letter/order # selected: \_\_\_\_\_

## Witness Identification Statements

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Officer: This is a two-page form. Please complete and sign the first side also.

\_\_\_\_\_  
Signature of officer conducting array/date

\_\_\_\_\_  
Witness signature/ date

**REPORT OF SHOW-UP IDENTIFICATION PROCEDURE**  
(side 1 of 2)

Case # \_\_\_\_\_  
Police Dept. \_\_\_\_\_

Date \_\_\_\_\_  
Time \_\_\_\_\_

**Identifying Witness (name & DOB)** \_\_\_\_\_

Officer(s) Conducting Presentation \_\_\_\_\_

Others Present (*officers, relatives, etc.*) \_\_\_\_\_

Person Shown to Witness (*name, address, DOB*) \_\_\_\_\_

**Circumstances Warranting Show-Up** (*Good Reason*)

- Proximity to crime/method of flight (*time/place*) \_\_\_\_\_
- Matching factors to witness' initial description (*clothing, gender, size, color, etc.*) \_\_\_\_\_
- Factors attracting police attention (*possession stolen items, etc.*) \_\_\_\_\_
- Need for quick/efficient police investigation \_\_\_\_\_
- Public safety concerns/exigency \_\_\_\_\_

**Description of Show-Up Procedure:**

Address/location of show-up \_\_\_\_\_

Lighting \_\_\_\_\_

Location/position of witness \_\_\_\_\_

Location/position of suspect \_\_\_\_\_

Suspect wearing handcuffs: yes \_\_\_\_\_ no \_\_\_\_\_ Comment \_\_\_\_\_

Officer-to-suspect distance \_\_\_\_\_

Other \_\_\_\_\_

**Statements by any other people, made during ID procedure and in presence of witness:**

**This is a two-page form. Please complete the second side and have the witness sign.**

\_\_\_\_\_  
Officer conducting procedure/date

**REPORT OF SHOW-UP IDENTIFICATION PROCEDURE**  
(side 2 of 2)

Case # \_\_\_\_\_  
Police Dept. \_\_\_\_\_

Date \_\_\_\_\_  
Time \_\_\_\_\_

**Identifying Witness (*name & DOB*)** \_\_\_\_\_

**Advisements to Witness Before Presentation**

- \_\_\_ 1. I am going to show you an individual.
- \_\_\_ 2. This may or may not be the person who committed the crime, so you should not feel compelled to make an identification.
- \_\_\_ 3. It is just as important to clear innocent people as it is to identify possible perpetrators.
- \_\_\_ 4. Whether or not you identify someone, the police will continue to investigate.
- \_\_\_ 5. After you are done, I will not be able to provide you with any feedback or comment on the results of the process.
- \_\_\_ 6. Please do not discuss this identification procedure or the results with other witnesses in this case or with the media.
- \_\_\_ 7. Focus on the event: the place, view, lighting, your frame of mind, etc. Take as much time as you need.
- \_\_\_ 8. People may not appear exactly as they did at the time of the event, because features such as clothing and hair style may change, even in a short period of time.
- \_\_\_ 9. As you look at this person, tell me if you recognize him/her. If you do, please tell me how you know the person, and in your own words, how sure you are of the identification.

**Witness Identification Statements**

**Identification made:** Yes \_\_\_\_\_ No \_\_\_\_\_

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**Officer: This is a two-page form. Please complete and sign the first side also.**

\_\_\_\_\_  
Signature of officer conducting the show-up/date

\_\_\_\_\_  
Witness signature/date

## **Appendix C**

### **REPORT OF THE TASK FORCE ON EYEWITNESS EVIDENCE**

July 2004

Presented to

Daniel F. Conley, Suffolk County District Attorney

Kathleen M. O'Toole, Commissioner  
Boston Police Department

#### **Task Force Members**

Willie Davis, Esquire  
Davis, Robinson & White

John Gallagher, Superintendent  
Boston Police Department

James Doyle, Esquire  
Carney & Bassil

Mary Jo Harris, Esquire  
Legal Advisor, Boston Police Department

Michael Doolin, Esquire

Paul Joyce, Superintendent  
Boston Police Department

Josh Wall  
First Assistant District Attorney  
Suffolk County

Gary Wells, Ph.D  
Iowa State University

## **I. EXECUTIVE SUMMARY**

On March 8, 2004, the Suffolk County District Attorney, Daniel F. Conley and the Boston Police Commissioner, Kathleen M. O'Toole, announced the formation of a Task Force on Eyewitness Evidence. The Task Force was charged with reviewing the investigative process for cases in which eyewitness identification was a significant issue, and recommending any appropriate changes in the means and manner of investigation. The Task Force was born of the concern, as evidenced by a series of recently overturned convictions, that better practices in such cases would yield more reliable results and significantly reduce the potential for error.

The Task Force offers 25 separate recommendations. A number of these are, to our knowledge, without precedent in any major city police department and prosecutor's office. Taken together, these 25 recommendations represent a dramatic leap forward in the manner in which police and prosecutors investigate and prosecute cases and would place Boston and Suffolk County in the forefront in comprehensively addressing an issue of both local and national concern.

The Task Force was co-chaired by Boston Police Superintendent John Gallagher and Suffolk County First Assistant District Attorney Josh Wall. It included three members of Boston's defense bar: Willie Davis, Esq. of Davis, Robinson and White; Michael Doolin, Esq.; and James Doyle, Esq. of Carney and Bassil. The Task Force also included Gary Wells, Ph.D from Iowa State University, Mary Jo Harris, Legal Advisor to the Boston Police Department and Boston Police Superintendent Paul Joyce.

Professor Wells and James Doyle brought to the Task Force particular expertise in the area of eyewitness evidence. Professor Wells is the internationally recognized academic expert on eyewitness observations, human memory, and identification procedures. He has, for two decades, been the leader of efforts to advance scientific knowledge and integrate scientific procedures with actual police investigative work. James Doyle has taught, written and lectured extensively on eyewitness evidence, identification procedures, and the impact of related scientific research.

Throughout its work, the Task Force was cognizant of the high stakes involved in investigating identification cases and the serious responsibilities the Task Force owes to certain groups. Specifically, the Task Force believed its greatest responsibilities were owed to (1) the victims of crimes who deserve effective prosecution of the actual perpetrator; (2) the eyewitnesses whose honest effort to accurately identify suspects should be made under the best conditions; (3) the investigators and prosecutors who rely on their agencies to provide the most effective and updated procedures; and (4) most importantly, those innocent suspects who pay the penalty for inaccurate identifications.

After an initial review of erroneous conviction cases, the Task Force concluded that improving identification procedures is one of many things that can and should be done to reduce the risks of misidentifications, prosecution of innocent suspects and erroneous convictions. In recognition, however, of the high stakes involved in identification cases as demonstrated by the erroneous conviction cases, the Task Force decided that its initial focus on identification procedures (e.g., photo lineups) needed to expand to include other aspects of investigations and prosecutions. The Task Force recommendations reflect a comprehensive approach that encompasses not only identification procedures, but also investigative and prosecution practices, forensic scientific evidence, training, and post-conviction practices.

The Task Force makes the following recommendations:

**Identification Procedures.** The Task Force recommends adoption of the identification protocols described in the Department of Justice’s Eyewitness Evidence Guide. Using the DOJ protocols is an important step forward for fair and reliable identification procedures, but the Task Force concluded that there were significant steps that go beyond the DOJ Guide that need to be taken to insure the highest standards for Boston. Scientific research strongly supports sequential identification procedures and blind administration procedures as the best tools available to combat misidentifications. Historically, law enforcement in this country has not used either sequential or blind administration procedures. Research conducted in the 1980s and 1990s built academic support among psychological scientists for these new procedures. Despite the best efforts of some of its members, the DOJ national working group that produced the DOJ Guide could not agree to recommend the two biggest changes: sequential and blind administration procedures. After reviewing the scientific evidence, the Task Force concluded that sequential and blind administration procedures should, in conjunction with the DOJ protocols, be used in Boston as the most effective way to reduce misidentifications. Adopting this level of reform will set a new standard. Task Force member James Doyle, also a member of the DOJ national working group, described for the Task Force that, “this amount of reform has never before been voluntarily undertaken by a major metropolitan police department.”

**Prosecution Practices.** The Task Force is confident that reform in identification procedures will significantly reduce misidentifications, but also recognizes that even the best procedures cannot eliminate all misidentifications. The human memory, as reliable as it can be, cannot achieve perfection. In response to that reality, the Task Force proposes an approach that, to the best of our knowledge, has never been done before. Specifically, the Task Force recommends that the District Attorney’s office adopt written policies for identification cases. Reform efforts in other jurisdictions have not included written reforms for the prosecutor’s office. Our recommendations for prosecution practices are designed to give prosecutors greater abilities to investigate cases in a manner that will expose misidentifications and prevent those cases from proceeding. With that goal in mind, the Task Force recommends (a) specific, written instructions for prosecutors to use in investigating and prosecuting identification cases, (b) obtaining an attorney for every suspect who participates in a live lineup, (c) establishing an Eyewitness Evidence Committee of senior prosecutors to review identification cases, (d) require that every identification case brought in Superior Court be approved for prosecution by either the First Assistant or the Chief of Homicide, (e) continue the policy of the District Attorney’s office not to oppose post-conviction requests for DNA testing of relevant evidence, and (f) continue the District Attorney’s DNA Committee of senior prosecutors to review and make decisions on post-conviction motions that involve requests for DNA testing.

The following list, assembled in categories, includes each specific recommendation made by the Task Force.

#### **Identification Procedures**

1. Adopt in full the recommendations on eyewitness evidence set forth by the United States Department of Justice.
2. Use sequential presentation of photographs in photo lineups.
3. Use sequential presentation of persons in live lineups.

4. Blind administration of photo lineups, which requires that the photo lineup be shown by an investigator who has no knowledge of which photograph is the suspect's.
5. Blind administration of live lineups, which requires that the live lineup be administered by an investigator who does not know which person is the suspect.
6. Use a standard printed form which provides eyewitnesses essential instructions for viewing a photo lineup or a live lineup.
7. Require detailed documentation, by means of a separate report, of every identification procedure conducted by the Boston Police.
8. Adopt as policy that every photo lineup shall consist of 8 photographs (7 fillers and 1 suspect) and that every live lineup shall consist of 6 persons (5 fillers and 1 suspect).
9. Use a live lineup subsequent to a photographic array in certain cases where testing the witness' ability to make an in-person identification could be of significant evidentiary value.
10. Use booking photograph compilations ("mug books") of scores of people as a possible source of identification only when all other investigative leads have been exhausted.

### **Investigative Practices**

11. Ensure that the Boston Police Crime Laboratory at all times be maintained with excellent equipment and resources, and a full staff of trained and experienced scientists.
12. Ensure that the forensic technology units of the Bureau of Investigative Services -- Identification (fingerprint) and Photography and Ballistics -- receive certification from national associations.
13. Adopt a policy requiring the electronic recording of statements made by consenting suspects in custodial settings, and for that purpose providing professional quality recording equipment throughout the police department.



### **Prosecution Practices**

14. Adopt instructions for prosecutors for investigating and prosecuting identification cases.
15. Adopt a policy that an attorney be provided for each suspect who participates in a live lineup
16. Establish in the District Attorney's office an Eyewitness Evidence Committee of senior prosecutors to review investigations of identification cases and charging decisions, and to direct training efforts.
17. Require by formal policy that every identification case brought in Superior Court be approved for prosecution by either the First Assistant or the Chief of Homicide.
18. Continue the policy of the District Attorney's office not to oppose post-conviction requests for DNA testing of relevant evidence.
19. Continue the District Attorney's DNA Committee, an existing committee of the office's senior prosecutors to review, monitor, and make decisions on post-conviction motions that involve requests for DNA testing.

### **Joint Policies of the Agencies**

20. Adoption by both agencies of formal policies supporting extensive and thorough use of the Grand Jury to develop and document evidence in indictable cases.
21. Adoption by both agencies of formal policies supporting extensive cooperation and collaboration between police and prosecutors from the outset of a felony investigation.
22. Adoption by both agencies of practices of extensive and thorough supervision of investigators and prosecutors by experienced supervisors in their respective agencies.

### **Training and Review**

23. Initial and ongoing training of police officers, detectives, and prosecutors on identification procedures, investigation of identification cases, and prosecution of identification cases, including joint training where appropriate.
24. Annual internal review, for at least the next two years, of these recommendations to evaluate the implementation and the effectiveness of new procedures and policies.
25. Continuation of this Task Force for the purposes of (a) monitoring the adoption of these recommendations and (b) suggesting any revisions or additional recommendations that would improve the investigation and prosecution of identification cases.

## **II. Erroneous Conviction Cases**

The Task Force reviewed the misidentification cases that have resulted in erroneous (or unfair) convictions in Boston in the past 15 years. The number of erroneous convictions has been disturbing and unacceptable for anyone interested in the fair administration of justice in Boston. There has not, however, been an investigation leading to an erroneous conviction since 1997 (Stephen Cowans). The Task Force reviewed the erroneous conviction cases and compared the practices used in those cases with the current practices of the Boston Police and the Suffolk District Attorney. In reviewing the erroneous conviction cases, therefore, the Task Force had two questions: (1) were there reasons that the rate of erroneous conviction cases has declined and can those reasons, once identified, contribute to our recommendations? (2) Were there actions, events, or mistakes in the erroneous conviction cases that would suggest or compel certain reforms?

a. DNA Cases. It is important to know that the erroneous conviction cases fall into two categories: DNA and non-DNA. The DNA cases are primarily sexual assault cases (Marvin Mitchell, Anthony Powell and Neil Miller) with biological evidence left by the perpetrator. When the cases were investigated up to 15 years ago, DNA was not available and admissible in court. Once DNA became available and admissible, the preserved biological evidence underwent DNA testing and the results were used in post-conviction proceedings to exonerate Marvin Mitchell, Anthony Powell and Neil Miller.

The advances in DNA science mean that defendants in recent and future sexual assault cases will not be convicted for lack of forensic scientific testing. Current investigative practices include testing of biological evidence as part of the investigation. Since the mid-1990s, DNA testing has been a feature of the investigation rather than just the post-conviction proceedings.

The Boston Police Crime Laboratory is fully accredited and nationally recognized for its accuracy, efficiency and professionalism. Significant improvements made in the last

ten years have brought the Crime Lab to this level of competence and reliability. The Crime Lab's work with DNA and other types of physical evidence will continue to be a critical piece in the investigation of identification cases. For that reason, **the Task Force recommends that the Crime Laboratory at all times be maintained with excellent equipment and resources, and a full staff of trained and experienced scientists.**

Nearly half of the erroneous conviction cases have not involved DNA testing. In these "non-DNA cases," it was additional investigation, brought on by new information, that led to vacating the convictions. The post-conviction investigation that freed the wrongly-convicted defendants in non-DNA cases was done primarily, and in some cases entirely, by police and prosecutors.

In reviewing the erroneous conviction cases, both DNA and non-DNA, the Task Force concluded that all the forensic sciences are critically important. In any given case, it might be the fingerprint evidence or the ballistics evidence that provides the most probative evidence implicating or clearing a suspect.

The Boston Police Crime Lab is the model of excellence for the department's other forensic units. Supervisors in the Crime Lab set national certification as their goal and improved all aspects of the Lab's operation in order to meet that goal. Certification would serve the same purpose for the other forensic units. The Task Force, therefore, recommends that **the forensic technology units of the Bureau of Investigative Services – (a) Identification (fingerprint) and Photography, and (b) Ballistics – receive certification from national associations.**

b. Lessons Since 1997. The Task Force compared current investigative procedures with the investigations conducted in the older exoneration cases to determine if there were changes that, in combination with the availability of forensic DNA testing, have lessened significantly the pace of erroneous convictions. The Task Force identified procedures, implemented by the Boston Police and the Suffolk District Attorney in the mid to late 1990s, that significantly improved investigations and prosecutions. The Task Force also found, however, that these changes have been widely but not uniformly implemented, and the Task Force recommends the following practices - essential for fair and reliable investigations - be adopted as formal policy throughout the Police Department and the District Attorney's office:

1. **extensive cooperation and collaboration between police and prosecutors from the outset of the investigation;**

2. **extensive and thorough use of the Grand Jury to develop, preserve, and document evidence;**
3. **extensive and thorough supervision of investigators and prosecutors by experienced supervisors.**

The case of Tiffany Moore's murder in 1988 is the textbook example of what can happen when the investigation includes little communication between police and prosecutors, vague or distant supervision, and minimal Grand Jury work. Shawn Drumgold was arrested, indicted and convicted for the murder of the 12-year old girl. Drumgold's motion for new trial led to an extensive evidentiary hearing in 2003, 4 years after the trial. At the hearing, police and prosecutors testified that they had little or no communication and collaboration during the investigation of the case and there was little or no meaningful supervision or case review (even in this high profile case) that would assist or direct the assigned investigator or prosecutor. Additionally, rather than using Grand Jury as means of presenting the important civilian witnesses (including several identification witnesses), the prosecutor presented only two witnesses (one being a police detective who presented abundant hearsay as a substitute for live witnesses).

The Task Force concluded that the inadequate practices in the 1988 investigation significantly contributed to a trial which convicted the defendant but was determined years later to have been conducted unfairly. The motion for new trial was allowed in 2003 and the District Attorney, in the interests of justice, decided not to retry the case.

The Drumgold case is but one example of what the Task Force observed as routine practice in the earlier era that produced numerous erroneous convictions: the police investigated the case without communication and input from the prosecutor; the prosecutor used the Grand Jury merely to secure an indictment rather than to develop and document evidence, and both the police investigator and the prosecutor operated without adequate supervision and direction.

Beginning in the mid-1990s and emerging through the late-1990s, the Boston Police Department and the District Attorney's office developed investigative practices that included cooperation, communication, collaboration, supervision and review, and thorough Grand Jury presentations. The Task Force believes that these improved practices, in combination with DNA forensic testing, are two significant reasons for the decline in erroneous conviction cases since 1997. To build on these improvements, the Task Force recommends that these practices be expanded and adopted as policy so that they are used consistently and uniformly in all cases by all investigators and prosecutors.

Supervision and communication lead to the same desired effect: more professionals involved in more discussion and review of cases. The opportunity for a greater exchange of ideas by investigators and prosecutors with different perspectives will produce more objective and more thorough investigations. An investigation that is objective and thorough will reduce the chances of an erroneous conviction based on misidentification.

The importance of Grand Jury work cannot be overstated. The presentation of witnesses to the Grand Jury has become an essential part of investigating, preserving, and documenting the facts of the case. Witnesses testifying under oath and on the record is an excellent method of making accurate and reliable information available to defendants, defense counsel, judges and jurors. A thorough Grand Jury presentation gives every person with an interest in the case the opportunity to review, analyze and critique the credibility and accuracy of the witnesses, the thoroughness and professionalism of the investigation, and the strengths and weaknesses of the case. Presenting the critical eyewitnesses and investigating police officers to the Grand Jury is a remarkably important guard against misidentifications and erroneous convictions.

The Task Force recommends that these three practices, effective in their use in recent years, become more consistent, uniform and permanent through policies and training. **In short, it should not be an option to avoid cooperation between agencies, communicating with supervisors, or using the Grand Jury.**

c. Lessons From Erroneous Conviction Cases. The Task Force examined the misidentifications made in the erroneous conviction cases with the expectation that there would be patterns that connected the identification errors. There was, however, no widespread characteristic or pattern that appeared in or explained a bulk of the cases. For example, a pattern of cross-racial misidentifications might be expected. There was, however, no such pattern as most identifications involved eyewitnesses identifying suspects of their own race. As another example, some might expect a pattern of admissions by the defendant that were not electronically recorded. Not one erroneous conviction case included an unrecorded interview containing admissions by the defendant.

The Task Force recognized, however, the significance of suspect interviews. Whenever a suspect decides to make a statement in a custodial interview, the suspect's statement is likely to be of critical importance in the investigation. The interview should be recorded. Recording requires (a) the consent of the suspect, as required by statute, and (b) the investigator's judgment, based on training and experience, on when to seek the defendant's consent and begin recording. Investigators describe and common sense teaches that many suspects will not speak freely while being recorded. For those suspects, investigators must develop rapport, encourage communication and obtain information before recording can commence. The objectives are to develop as much information as possible and document that information. Both objectives must be met without sacrificing one for the other. **The Task Force recommends required electronic recording of statements made by consenting suspects in custodial**

**interviews, and for that purpose professional quality recording equipment should be provided throughout the police department.**

Without a pattern that explained several cases, the Task Force concluded that the issues were more complicated and that a comprehensive approach and set of recommendations for identification cases were necessary. The lack of a pattern is one of the factors that led the Task Force to expand its focus beyond a set of identification procedures to include more comprehensive recommendations.

### **III. The Scientific Approach to Eyewitness Evidence**

In studying eyewitness evidence, Professor Wells uses an analogy that assisted the Task Force in its analysis and recommendations. Professor Wells likens eyewitness evidence to physical trace evidence.<sup>30</sup> Physical trace evidence, such as fingerprints, fibers or blood, can help determine the facts of a crime and the identity of the perpetrator. The observations of an eyewitness are items of trace evidence contained in the witness' memory. Like physical evidence, memory trace evidence can be contaminated, lost, destroyed or otherwise made to produce inaccurate results. Like physical trace evidence, the manner in which memory trace evidence is collected can have important consequences for the accuracy of the results.

The Task Force concluded that a more scientific approach to collecting and analyzing eyewitness evidence should be the guiding principle for our recommendations. Police protocols for the collection, preservation and interpretation of physical evidence are dictated largely by forensic scientists, and the practice of physical evidence collection and examination has tried to borrow as much as possible from science. The analysis of physical evidence, especially biological traces, has advanced rapidly in the past decade. In fact, it is the advancement in DNA forensic science that has made evident the weaknesses in eyewitness evidence.

These recommendations for eyewitness evidence are based on a scientific model. All members of the Task Force -- representing police, prosecutors, the defense bar, and psychological scientists -- agree that the recommendations will improve the justice system's ability to collect, preserve and analyze eyewitness evidence. Our goals are to (1)

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<sup>30</sup> Professor Wells developed this analogy years ago and the description and discussion of the trace evidence analogy is taken from his academic writings.

make it less likely that an eyewitness will make a mistaken identification, (2) give police and prosecutors investigative practices that will expose mistaken identifications, and (3) increase the reliability and strength of cases that are based on accurate identifications.

#### **IV. Collecting and Preserving Eyewitness Evidence**

The failure of the criminal justice system to adopt a scientific model for eyewitness evidence is attributable, in part, to a lack of understanding of how human memory works.<sup>31</sup> Many assume that information stored in memory remains largely unchanged over time, is impervious to suggestion, and that memory failures are primarily failures to retrieve information. In fact, however, memory can be influenced by post-event information, is susceptible to suggestion, and can fail or err in many different ways. Although research established that mistaken identification rates increase under certain conditions, research also established that many of these conditions could actually be avoided by the use of more scientific procedures for photo lineups and live lineups.

The Task Force makes the following recommendations for the scientific collection and preservation of eyewitness evidence:

- 1. Adopt the recommendations of the Eyewitness Evidence Guide developed by the Department of Justice;**
- 2. Adopt a sequential procedure for photo lineups and live lineups; and**
- 3. Adopt blind administration procedures for photo lineups and live lineups.**

In recommending these new procedures, the Task Force is not criticizing the current identification procedures of the Boston Police Department. The current procedures have been used objectively and fairly by Boston detectives for many years. The procedures fully comport with federal and state constitutional requirements. The current procedures have produced countless reliable and accurate eyewitness identifications. As Professor Gary Wells has stated, “Boston’s previous procedures were already at or above the national level and there is no reason to think that Boston’s old procedures placed innocent suspects at a unique level of risk.” The Task Force in no way intends that these recommendations be used to undermine reliable identifications and reliable cases built on current procedures. The Task Force does intend that these recommendations be used to improve on the current constitutionally-sound practices.

**DOJ Guide.** The Task Force recommends that the Boston Police Department adopt the recommendations of the Eyewitness Evidence Guide developed in 1999 by the United States Department of Justice’s Technical Working Group for Eyewitness Evidence.

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<sup>31</sup> These comments on human memory are taken from the academic work of Professor Gary Wells.



The DOJ procedures are based on scientific research. The DOJ Guide gives procedures for the 911 operator, the responding officer, and the investigating detective. The procedures include the best methods for getting accurate information from eyewitnesses about the incident and the suspect's description, and also provide specific steps for identification procedures.

Many of the steps described in the DOJ Guide are currently in use by some detectives and some units of the Boston Police. The steps are not, however, in use in their entirety throughout the department. The DOJ recommendations need to be the focus of training and implementation department-wide. Superintendent John Gallagher of the Task Force has drafted a departmental Rule that incorporates the recommendations. Adoption of the Rule will implement the protocols described in the DOJ Guide. Some of the more significant recommendations are described in the remainder of this section.

(a) The manner of questioning the witness at the scene and in the follow-up interview will affect how much accurate information is obtained. Information should be gathered through open-ended questions (e.g., "What can you tell me about the car?"); augmented by closed-end questions (e.g., "What color was the car?"); avoiding suggestive or leading questions (e.g., "Was the car red?"). All information obtained from the witness is documented in a written report.

(b) The DOJ Guide also describes instructions that the lineup administrator should give to each eyewitness who views a photo or live lineup. The Task Force recommends that the Boston Police use a printed set of instructions for every lineup identification procedure; and toward that end Superintendent Gallagher developed a standard printed form. The standard form will include those instructions developed from scientific research that create the optimal conditions for the eyewitness. By using a standard form, signed by the witness, the Boston Police will have procedures that ensure that every eyewitness is given the identical set of effective instructions.

(c) By adopting the DOJ recommendations, the Boston Police will also be taking the significant step of asking for and recording the witness' own statement about his level of confidence in an identification if one is made. Because research demonstrates that a witness' confidence can be increased over time by extraneous factors, it is important to ascertain and document the certainty level at the time of the identification, before other factors intervene.

(d) The DOJ Guide also includes detailed procedures for conducting showup identifications, which are conducted with witnesses by presenting a suspect in person shortly after the incident. The opportunity to see a suspect in person within minutes of the event can lead to important evidence, but procedures are necessary for fairness and reliability given that there are no fillers. The Task Force notes that no erroneous conviction case in Boston was based on an inaccurate showup identification, which provides some anecdotal evidence for the reliability of showup identifications.

(e) Mug books (collections of photos of previously arrested persons) should be viewed only if all other reliable sources and leads have been exhausted. Viewing repeated images has a tendency to blur the witness' memory of the actual perpetrator's face. Results of a mugbook identification should be evaluated with caution.

(f) In selecting fillers for a photo lineup or live lineup, complete uniformity of features is not required. Avoid using fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers. Selecting a filler whose appearance is nearly identical to the suspect's focuses the witness' attention on the similar photos or persons, thus creating a suggestibility factor.

In summary, the DOJ recommendations adopted by the Boston Police will mean that investigators are developing and documenting reliable information from eyewitnesses, preparing fair and effective photo and live lineups and, through standard printed forms, providing optimal, scientific conditions for eyewitnesses involved in an identification procedure.

**Sequential Photo Lineups and Live Lineups.** The common current practice for photo lineups and live lineups is to present to the eyewitness all photographs or lineup members at one time. This practice is known as a simultaneous array. Scientific research has demonstrated that, under simultaneous conditions, eyewitnesses tend to compare photographs and lineup members with each other to determine which one most closely

resembles the perpetrator relative to others, a process called relative judgment. Professor Wells devised an alternative procedure -- a sequential presentation -- that would reduce the tendency of eyewitnesses to rely on relative judgments. In the sequential procedure, the eyewitness is presented with one photograph or one lineup member at a time, and the eyewitness must decide on each photograph or person before viewing the next photograph or person. Research demonstrates that sequential procedures would result in significantly fewer misidentifications. The Task Force recommends that photo lineups and live lineups be conducted using the sequential procedure.

**Blind Administration of Arrays and Lineups.** With blind administration of identification procedures, the person conducting the photo lineup or live lineup is not aware of which photograph or person is the suspect. The importance of blind administration procedures stems from what researchers call the confidence malleability of the eyewitness. Confidence malleability describes an effect that has been repeatedly demonstrated in scientific research – that the eyewitness’ confidence in his lineup pick can increase in a variety of different ways. For example, increased confidence can come from confirmation (“You picked the right suspect”), repeated questioning about the incident or the identification, or any number of non-verbal and inadvertent cues.

There is significant research demonstrating confidence malleability, and the confidence of the eyewitness is often an important factor at trial. The eyewitness often will testify about his degree of confidence, and judges specifically instruct jurors to consider the degree of confidence expressed by the eyewitness. An eyewitness’ confidence, therefore, should be based on his own memory rather than on external information.

The importance of blind administration is well-accepted in psychological scientific research of all types. It is standard scientific practice to conduct scientific research using administrators who do not know specific information about the test they administer. The scientific technique should be used for actual identification procedures to eliminate the possibility that a witness’ confidence will be influenced inadvertently by the administrator. After nearly 25 years in eyewitness scientific research, Professor Wells describes blind

administration as the single most important step a department can take to improve its identification procedures.

## **V. Analyzing Eyewitness Evidence**

The reforms recommended in the previous section will remove many conditions that lead to eyewitness misidentifications. Those reforms will not, however, eliminate all eyewitness error. As demonstrated by scientific research and erroneous conviction cases, some eyewitness misidentifications will occur even when the best procedures have been followed.

The Task Force, therefore, devoted considerable thought to the following question: Are there new ways of analyzing identification evidence that would give prosecutors greater ability to expose misidentifications? Answering that question led the Task Force into uncharted territory; eyewitness evidence reform undertaken in other jurisdictions and in the DOJ Guide has not included prosecution practices.

The Task Force concluded that charting this territory for prosecutors was critically important. As one Task Force member described it, “How do we ask police to accept important levels of change without asking the same thing of prosecutors? In this era of erroneous convictions, if any serious prosecutor does not think that lawyers can do a better job with identification cases, then we have a problem, caused by naivete or arrogance, that has to be addressed.”

Having made the decision to expand its focus to include prosecutors, the Task Force makes the following recommendations:

- 1. Adopt instructions for prosecutors for investigating and prosecuting identification cases.**
- 2. Adopt a policy that an attorney be provided for each suspect who participates in a live lineup.**
- 3. Establish in the District Attorney’s office an Eyewitness Evidence Committee of senior prosecutors to review investigations of identification cases and charging decisions, and to direct training efforts.**

4. **Continue the practice and require as written policy that every identification case brought in Superior Court be approved for prosecution by either the First Assistant or the Chief of Homicide.**
5. **Continue the policy of the District Attorney's office not to oppose post-conviction requests for DNA testing of relevant evidence.**
6. **Continue the District Attorney's DNA Committee, an existing committee of the office's senior prosecutors to review, monitor, and make decisions on post-conviction motions that involve requests for DNA testing.**

**Instructions for Prosecutors.** Investigators and prosecutors need training and experience to analyze an eyewitness identification. The traditional analysis focuses and ends on the ability of the witness to observe and perceive the perpetrator and includes the following factors: the duration of the assault, the witness' focus on the perpetrator's face, the lighting conditions, the confidence of the witness, and any aspect or condition of the victim that might affect his or her ability to make observations (such as age, intoxication, or eyesight). These factors continue to be important for investigators and prosecutors, and jurors are instructed that these are the factors they should consider in evaluating eyewitness identification. In addition, however, police and prosecutors need to perform a broader analysis that includes more than the conditions under which the observations were made.

The need for proper analysis is sufficiently critical that the Task Force recommends instructions for the prosecutors who, through their work with the police, assist in the investigation and, through their work in the Grand Jury, develop and document the investigation. It is not sufficient to change the way police conduct identification procedures without also setting instructions for prosecutors to analyze the resulting identifications and integrate the eyewitness identification with the other facts of the investigation. It is expected that these instructions will be used in training, supervision and, most importantly, the daily work of prosecutors who are investigating identification cases. The recommended instructions are as follows:

#### **INSTRUCTIONS FOR PROSECUTORS: INVESTIGATING AN IDENTIFICATION CASE**

The police investigator is responsible for the investigation of a case. The prosecutor, however, has ultimate responsibility for the cases that are prosecuted. The prosecutor, therefore, should participate in the investigation in every way that is productive. These instructions are designed to assist prosecutors in developing facts in identification

cases, analyzing the facts, and making decisions on which suspects to charge.

1. First and foremost, approach each case objectively and with a critical view of the evidence. Historically, if a witness says he is confident in an identification, the investigators and the prosecutor have adopted a similar confidence in the strength of the case. The confidence of the witness should not be the primary reason for the prosecutor's confidence in the case. Always be open to the possibility that an identification is mistaken, and develop the evidence with that possibility in mind. The witness' identification is only one fact in the investigation; it must be weighed and considered with and against all the other facts. **The value of the identification is determined by the other facts and circumstances established in the investigation.**

2. The prosecutor must be vigilant and adhere to the strictest standards in the following six areas: (1) definitively establish the description which is initially given by the witness; (2) definitely establish every fact concerning the identification procedure; (3) know the crime scene and physical evidence inside and out; (4) thoroughly develop and investigate all circumstances -- positive and negative -- which are relevant to the perpetrator's identity; (5) establish and document all this information as early as possible in the investigation; and (6) use the Grand Jury to develop and document all the evidence concerning the description, the ID procedure, the crime scene, and the circumstantial evidence relevant to the identity of the perpetrator. **At all stages, remember that you are working not to build a case against a particular suspect, but to develop facts that identify the actual perpetrator.**

To accomplish these goals, take the following steps:

A. It is essential to speak as soon as possible with any police officer who had contact with the identification witness. Examine, but do not rely solely on, the Incident Reports and Supplemental Reports. Make it a priority to interview all officers who spoke with the witness, including those officers who did not identify their involvement by filing

reports. The goal is to know everything about what happened at the scene, the description given and the ID procedure (including the exact words used by the investigator and the witness).

B. In establishing the description given by the witness, be careful to talk to both uniformed officers and detectives. Both will probably have relevant information.

C. With a show-up identification, assume that several officers participated. For example: two officers met the witness at the scene, two different officers transported her to the show-up site, and three other officers conducted the show-up. From those seven officers, there exists a single Incident Report. It is up to you to work with all the officers involved to get all the information in an accurate and documented form. A critical part of the information is the actual words used by the officer and the witness (and the suspect).

D. With a photo lineup identification, it is often not immediately apparent (and sometimes not documented) how the suspect's photograph got into the array. You must know the answer to that question. The decision to include a suspect's photo is often based on good circumstantial evidence, and sometimes based on something less probative. Including a photo without articulable reasons for doing so can be the key point in turning an identification case into a misidentification case.

E. Get the 911 tape and turret tape immediately. Make sure the turret tape includes all channels that the officers used in communicating with each other. (The specific information on channels needs to be obtained directly from the officers involved.) These recorded conversations are frequently the most accurate source for the initial description, especially when the identification witness made the 911 call.

F. Interview the identification witness as soon as possible. Open-ended questions are critical. Do not try to lead the witness into echoing what the police report states. After the witness provides a narrative, focus the witness on specific areas in order to get the important and necessary details.

G. The initial interview is the time to examine the variables that affect the witness' ability to perceive the perpetrator. These variables -- time, distance, positioning, focus, lighting, etc. -- must be established.

H. Go to the scene.

I. Pay close attention to the crime scene (and the physical evidence contained therein) as described by witnesses and police and as documented by reports and photographs. Get photographs developed as soon as possible. If no scene photos were taken, get some taken. Review Crime Lab evidence receipt. Discuss the evidence with the criminalist at the Crime Lab. Know the scene inside and out.

J. Consider what evidence needs to be tested for the presence of DNA. Consult with the investigator and criminalist concerning testing of physical evidence.

K. Consider what evidence needs to be fingerprinted.

L. Evaluate all ballistics evidence for possible testing.

M. Take good notes of all your interviews, observations, and impressions. Notes will be invaluable in your Grand Jury and trial preparation.

N. Corroborate the identification as thoroughly as possible through circumstantial evidence. This can take many forms -- too many to describe specifically -- but its importance cannot be overestimated. The strengths and weaknesses of the circumstantial evidence are key factors in assessing the accuracy of the identification. The circumstantial evidence always informs, and sometimes directs, the charging decision.

O. Consider whether an investigation would benefit from having a witness who identified a suspect in a photo lineup also view a live lineup containing the suspect. This additional step would be taken when a second identification procedure might yield critical information about the witness' ability to make an in-person identification.

P. Consider what information a "non-identifying eyewitness" (one who fails to pick the suspect or picks a filler) is providing. The non-identification may mean that the witness did not have a sufficient opportunity to observe, but it might also mean that the suspect is not the perpetrator.

Q. Follow up on all alibi information: interview witnesses, put them before the Grand Jury, obtain documents, evaluate circumstantial evidence. If defendant is represented by counsel, ask counsel for all information concerning the alibi so it can be evaluated



and presented to the Grand Jury. Be aware of the possibility that a witness who is biased (e.g., suspect's mother or girlfriend) may be telling the truth.

R. If he's not yet charged, make sure suspect gets interviewed.

S. Establish the facts, don't try to change the facts.

T. Follow alternative paths and investigate alternative suspects as far as the evidence leads.

U. In going through the process of gathering and documenting information and evidence, continually evaluate and analyze the facts. Consider different scenarios, including ones consistent with misidentification. Try to poke holes in your own theories about the case. Compare each witness statement to the statements made by others and the physical evidence.

When it is time to make final charging decisions, **accept the evidence you have developed and give the evidence the weight it merits.**

If the investigation has established no circumstantial evidence to support a one witness photo identification in a stranger situation, you must proceed with extreme caution given what we now know about the possibility of misidentification.

If the prosecutor thoroughly investigates the case, thinks critically about the facts, and bases charging decisions solely on the facts, the prosecutor will have taken the most important steps to reduce the risk of an identification case becoming a misidentification case.

**Attorney For Live Lineup.** Because the live lineup requires the suspect to participate, the Task Force concluded that the suspect would benefit from the presence and advice of an attorney. The suspect's attorney, of course, would have no authority to direct investigators and prosecutors in the performance of their duties. The attorney would, however, be able to give the suspect information and advice, and would be able to make observations that might be of value when filing a motion to suppress the identification or cross-examining witnesses at hearing and trial.

**Applying Consistent Standards.** The Task Force considered whether, in addition to giving instructions for use by individual prosecutors, there could also be changes in management and supervision that would ensure that uniformly high standards were met in every identification case. Toward that goal, the Task Force recommends that the District Attorney establish an Eyewitness Evidence Committee of senior prosecutors to review investigations of identification cases. The Eyewitness Evidence Committee would review identification cases that involved complex investigations, difficult issues and close calls on charging decisions. The Committee will combine the skills and experience of several prosecutors and apply that expertise to the most challenging cases.

As a complement to the Eyewitness Evidence Committee, the Task Force also recommends, as a management policy, that every identification case brought in Superior Court be approved for prosecution by either the First Assistant District Attorney or the Chief of Homicide. Centralized approval will mean that every identification investigation and every decision to charge a suspect will have to meet certain high standards. Given what is at stake in identification cases, the District Attorney should require that cases are reviewed and approved at the highest level.

**Post-Conviction Practices.** A prosecutor's pursuit of justice does not end with a conviction. Erroneous conviction cases around the country have shown prosecutors using a variety of approaches to post-conviction cases involving untested evidence. These practices run from adamant opposition, to willful inaction, to cooperation and pursuit of possible exculpatory evidence. The Suffolk District Attorney's office has conducted its post-conviction work ethically and professionally in the erroneous conviction cases. Two practices from recent years have been particularly effective and should be adopted as permanent, written policies.

First, the District Attorney's policy not to oppose post-conviction requests for DNA testing of relevant evidence gives every convicted defendant the chance to use DNA testing when it might have a chance of yielding exculpatory results. This policy should be permanent and uniformly applied.

Second, the District Attorney's DNA Committee, comprised of senior prosecutors with significant experience in DNA issues and post-conviction cases, should be made permanent and continue to review, monitor and make decisions in post-conviction motions that involve requests for DNA testing. The DNA Committee has provided in recent years an important internal forum for analyzing challenging issues, evaluating new evidence, and determining the fairness of a conviction in light of new information. Its work is of sufficient importance that the DNA Committee should be a permanent part of the agency.

#### **VI. Training and Accountability**

The Task Force recommendations will be most effective if implemented through proper training and monitored with meaningful oversight. The Task Force, therefore, makes the following recommendations directed towards implementation and accountability.

- 1. Initial and ongoing training of police officers, detectives, and prosecutors on identification procedures, investigation of identification cases, and prosecution of identification cases, including joint training where appropriate.**
- 2. Annual internal review, for at least the next two years, of these recommendations to evaluate the implementation and the effectiveness of new procedures and policies.**
- 3. Continuation of this Task Force for the purposes of (a) monitoring the adoption of these recommendations and (b) suggesting any revisions or additional recommendations that would improve the investigation and prosecution of identification cases.**